Tan Ewe Huat v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO B-05-77 OF 1995
ABDUL HAMID MOHAMAD, KC VOHRAH JJCA AND FAIZA TAMBY CHIK J
26 OCTOBER 2001

Criminal Procedure *— Statements — Cautioned statement — Admissibility of — Whether exact words of caution must be used — Legal burden on prosecution to prove voluntariness — Defence to give specific details in challenging inadmissibility — Whether High Court right in relying on cautioned statement to convict accused*

The appellant was charged in the Shah Alam High Court that he together with another person had trafficked in 86.47g of heroin, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act thereof. At the close of the prosecution's case, the High Court acquitted the appellant's female companion and called upon him to make his defence on the trafficking charge. The appellant elected to make his defence on oath. The court convicted him on the trafficking charge. The High Court in convicting the appellant had principally relied on the cautioned statement made by the appellant to a Chief Inspector ('the recording officer'). The mainstay of the grounds supporting this appeal related to the appellant's challenge to the admissibility of the cautioned statement and the reliance placed on it by the High Court.

Held, dismissing the appeal:

(1) There was no hint of compulsion in the caution administered on the appellant to give a statement. In fact it was clear the caution administered to him showed that he was not required to make a statement but that if he did, it will be used in evidence. It was not necessary to use the prescribed words of the statutory caution; it would be sufficient if the words used were of like effect on the accused (see p 151G–H); *Din bin Yahya v PP* [1992] 1 MLJ 143 followed. The recording officer here, had instead of using the exact words of the statutory caution, unwittingly provided him with a clearer option for him not to give statement but the appellant opted to give the cautioned statement. There was no principle of justice that had been injured by the choice of words that the recording officer used when he administered the caution (see p 151H–I).

(2) The trial judge had made a finding that the recording officer had properly explained what the meaning of inducement was to the appellant and it was a valid finding of fact which the court agreed. The defence did not identify the nature of the inducement nor the person who induced the appellant to make the statement. The legal burden was always on the prosecution to prove voluntariness beyond all reasonable doubt and it was not for the defence to

prove voluntariness and that the prosecution did by producing positive evidence to prove that it was made voluntarily. The prosecution, however, would not be able to go beyond that on specific issues unless the defence challenged the admissibility on the ground that the caution was not properly administered with specific details as to what went amiss or challenged the voluntariness and admissibility of the statement on the basis that there was a threat, promise, inducement or oppression not in general and vague terms but in terms enough to identify the nature of the threat, promise, inducement or oppression and the person in authority who inspired it; to ask for something less would be to impose an unfair burden on the prosecution (see p 152C–E).

(3) The appellant was properly convicted on the basis of his admissions in the cautioned statement which had been properly admitted by the trial judge and which had been properly considered in the light of his defence and all evidence of the case as the court had observed. The court could see no reason for interfering with the trial judge's conviction on the charge of (see p 153D–E).

[Bahasa Malaysia summary

Perayu telah dituduh di Mahkamah Shah Alam di mana beliau dan seorang lagi telah mengedar dadah heroin sebanyak 86.47g, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dan boleh dihukum di bawah s 39B(2) Akta tersebut. Pada penutup kes pendakwaan, Mahkamah Tinggi membebaskan pasangan wanita perayu dan memanggil beliau untuk membuat pembelaan beliau terhadap tuduhan mengedar dadah tersebut. Perayu telah memilih untuk membuat pembelaan beliau atas sumpah. Mahkamah mensabitkan mereka dengan tuduhan mengedar dadah. Mahkamah Tinggi dengan mensabitkan perayu telah terutamanya bergantung kepada pernyataan beramaran yang dibuat oleh perayu kepada seorang Ketua Inspektor ('pegawai yang mencatat'). Alasan utama kepada rayuan ini adalah bantahan perayu terhadap kebolehterimaan pernyataan beramaran tersebut dan kebergantungan Mahkamah Tinggi terhadapnya.

Diputuskan, menolak rayuan tersebut:

(1) Tiada tanda pemaksaan dalam amaran yang diberikan ke atas perayu untuk memberikan kenyataan. Bahkan adalah jelas amaran yang diberikan kepada beliau menunjukkan bahawa beliau tidak dikehendaki untuk membuat kenyataan tetapi jika beliau ada berbuat demikian, ia akan digunakan sebagai keterangan. Adalah tidak perlu untuk menggunakan perkataan-perkataan yang ditetapkan dengan amaran statutori; adalah

mencukupi jika perkataan-perkataan tersebut yang digunakan mempunyai kesan sedemikian ke atas tertuduh (lihat ms 151G–H); *Din bin Yahya v PP* [1992] 1 MLJ 143 diikut. Pegawai yang mencatat di sini, telah sebaliknya menggunakan perkataan-perkataan yang tepat untuk amaran statutori tersebut, dengan tidak disedari telah memberikan beliau pilihan yang lebih jelas untuk beliau supaya tidak memberikan kenyataan tetapi perayu memilih untuk memberikan pernyataan beramaran. Tiada prinsip keadilan yang telah dicemari oleh pilihan pekataan-perkataan yang telah digunakan oleh pegawai yang mencatat semasa beliau memberikan amaran tersebut (lihat ms 151H–I).

(2) Hakim perbicaraan telah membuat satu penemuan bahawa pegawai yang melaporkan telah menerangkan dengan betul apa maksud dorongan kepada perayu dan ia adalah satu penemuan fakta yang sah yang dipersetujui oleh mahkamah. Pembelaan tersebut tidak mengenalpasti sifat dorongan tersebut maupun orang yang mendorong perayu untuk membuat kenyataan. Beban di segi undang-undang sentiasa terletak atas pendakwaan untuk membuktikan kesukarelaan dan pendakwaan berbuat begitu dengan mengemukakan keterangan positif untuk membuktikan bahawa ia telah dibuat secara sukarela. Pendakwaan bagaimanapun, tidak mampu untuk pergi lebih daripada itu tentang persoalan-persoalan spesifik kecuali jika pembelaan mencabar kebolehterimaan atas alasan bahawa amaran telah tidak diberikan dengan betul dengan butiran-butiran yang spesifik setakat mana apa yang tidak mencukupi atau mencabar kesukarelaan dan kebolehterimaan kenyataan tersebut berdasarkan wujudnya satu ugutan, janji, dorongan atau penindasan, bukan dalam terma yang umum dan tidak jelas tetapi dalam terma yang cukup untuk mengenalpasti sifat ugutan, janji, dorongan atau penindasan tersebut dan sesiapa yang berkuasa yang telah membangkitkannya; untuk bertanyakan sesuatu yang kurang daripada itu akan meletakkan satu beban yang tidak adil ke atas pendakwaan (lihat ms 152C–E).

(3) Perayu telah disabitkan dengan betul berdasarkan pengakuan beliau di dalam penyataan beramaran yang telah dimasukkan dengan betul oleh hakim perbicaraan dan yang telah dipertimbangkan dengan betul berdasarkan pembelaan beliau dan semua keterangan kes sebagai mana yang mahkamah telah perhatikan. Mahkamah mendapati tiada sebab untuk campur tangan dengan sabitan hakim perbicaraan tersebut tentang tuduhan mengedar dadah dan hukuman yang telah dijatuhkan ke atas perayu (lihat ms 153D–E).]

Notes

For a case on cautioned statement, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) para 3650.

Cases referred to

Chow Kok Keong v PP [1998] 2 MLJ 337 (refd)
Din bin Yahya v PP [1992] 1 MLJ 143 (folld)
Ibrahim v R [1914] AC 599 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)
Poon Heong v PP [1949] MLJ 114 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), (da), 37A(1), 39B(1)(a), (2)

Appeal from: Criminal Trial No 47–20 of 1991 (High Court, Shah Alam)

Karpal Singh (*Gurbachan Singh* with him) (*Bachan & Kartar*) for the appellant.

Vong Poh Fah (Deputy Public Prosecutor) for the respondent.

KC Vohrah JCA (delivering judgment of the court): The appellant was charged in the Shah Alam High Court that he together with another person had trafficked in 86.47g of heroin on 13 September 1990 at about 1.45am at house No 1, Jalan Taman Melur, Ampang, Hulu Langat, Selangor, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act thereof.

At the close of the prosecution's case, the High Court acquitted the appellant's female companion and called upon him to make his defence on the trafficking charge. The appellant elected to make his defence on oath. The court convicted him on the trafficking charge.

The High Court in convicting the appellant had principally relied on the cautioned statement made by the appellant to a Chief Inspector. That statement contained an admission that the police had examined his room and that in his wooden cupboard which he had kept locked the police found plastic packets of heroin. He admitted having previously sold several packets from the lot. He also admitted that a weighing machine was found in his cupboard.

The mainstay of the grounds supporting the appeal relates to the appellant's challenge to the admissibility of the cautioned statement and the reliance placed on it by the High Court. The appellant's next ground, relying on *Muhammed bin Hassan v PP* [1998] 2 MLJ 273, is that if the cautioned statement is ruled inadmissible by the Court of Appeal then the conviction cannot be sustained as the High Court had relied on the presumption of trafficking under s 37(da) of the Act which relies on the possession of 15 grams or more of heroin for it to be invoked when the court could not have relied on the presumption of possession of the heroin under s 37(d) on the basis the heroin was found in his room as there was no evidence *aliunde* to show that he had the possession of the heroin.

To understand the nature of the challenges made it would be necessary to narrate the relevant undisputed facts of the case.

A *Undisputed facts*

On 12 September 1990 at about 9.45pm a surveillance team of police personnel led by Inspector Hassan Jalaluddin ('PW4') at Jalan Pandan 1, Ampang, saw a Chinese man, later identified as the first accused and now the appellant, approaching the area of the surveillance. PW4 and his team
B approached the appellant whereupon he ran away. He was then chased, apprehended and arrested. The appellant subsequently led PW4 and his team to a car. In the car was a Chinese woman, later identified as the second accused, sitting in the front passenger seat. She was also arrested.

From the second accused was seized a bunch of seven keys. Both the
C appellant and the second accused were brought to the office of PW4 at the Head Office at Jalan Hang Tuah.

At about 1.45 am on 13 September 1990, PW4 with his team, the appellant and the second accused proceeded to a double storey link house at No 1, Jalan 25, Taman Melur, Ampang, Hulu Langat, Selangor.

D Using keys from the bunch of keys which had been seized PW4 unlocked the padlock securing the gate leading to the compound of the house and the other locks securing the front door and the grille thereat and they all entered the house.

PW4 then opened the door of the back room on the first floor with one of the keys from the bunch and entered the room.

E

Inside the room was a cupboard and using one of the keys from the bunch PW4 opened the cupboard. He found at the bottom of the cupboard three bags and a box. The three bags contained plastic packets wrapped in chinese language newspaper bundles with some loose packets in one of the bags. Inside the box was a weighing machine. All the packets held a
F substance which on analysis by the government chemist ('PW1') was found to contain 86.47g of heroin.

In the same room was found a bag in which were the international passports of the appellant and the second accused. Also found in the room were, inter alia, the lease agreement for the house naming the appellant as the tenant and rental receipts in his name.

G

On 15 September 1990, the appellant gave a statement to a recording officer, Chief Inspector Gian Kar Hoon, under s 37A of the Act. This statement was challenged as being inadmissible but after a trial within a trial was ruled as an admissible cautioned statement.

H *Identity of drug*

Mr Gurbachan who appeared with Mr Karpal Singh for the appellant argued that there were serious doubts as to the identity of the packets which were seized in the house where PW4 described the contents as powdery and the packets which were given to the government chemist for analysis the
I contents of which were described as granular and powdery. We shall deal with this issue first as if there is doubt as to the identity of the substance seized, then the conviction should be set aside. We have examined the notes

of proceedings of the trial and are satisfied as the learned judicial commissioner (the trial judge) was that there is no break in the chain of evidence from the time the packets of the drug were seized up to the time they were sent to the government chemist for analysis. We are satisfied that the substance described as powdery by PW4 was the same substance which was examined by the chemist although he described it, because of his training as a chemist and analyst, more accurately than PW4.

The cautioned statement

To understand the nature of Mr Karpal Singh's challenge as to the admissibility of the cautioned statement it would be necessary to look at the evidence PW4 gave during the trial within a trial relating to what he did before recording the cautioned statement.

When the appellant was brought before the recording officer, the officer recorded the personal details of the appellant in an official police form and noted that he had examined the appellant and had not found any bruise, cut or scar on his person. Before administering the caution under s 37A(1)(b) of the Act, the Chief Inspector also noted this:

> Bila ditanya jika ada apa-apa complain hendak dibuat kepada saya, dia jawab tiada, hanya mengatakan kawan perempuannya tidak terlibat apa-apa.
>
> ('When asked if he had any complaint to make to him, he replied there was none except he wished to state that his girlfriend is not involved at all.')

The Chief Inspector then recorded that he administered and explained to the appellant the caution under s 37A(1)(b) of the Act. He also recorded that he put a question to him and the answer given by the appellant thus:

> Soalan: Adakah kamu faham akan amaran yang dibacakan dan diterangkan kepada kamu dalam bahasa Hokkien seperti diatas?
> Jawapan: Faham.
> ('Question: Do you understand the caution that was read and explained to you in Hokkien as (stated) above?
> Answer: Yes')

Only then did the Chief Inspector proceed to record the cautioned statement from the appellant.

Mr Karpal Singh in challenging the admissibility of the cautioned statement argued that the Chief Inspector Gian, the recording officer of the statement, had not explained to the appellant what the word 'inducement' meant. And in connection with this, the learned counsel argued that the Chief Inspector should have questioned the appellant further when the appellant told him that his girlfriend was not involved.

The second point Mr Karpal Singh took on the inadmissibility of the cautioned statement was that the recording officer instead of telling the appellant that any statement 'may' be used as evidence had told him that the statement 'will be' used as evidence which is contrary to the terms of the provision under s 37A(1) of the Act.

Both points raised have reference to the proviso to s 37A(1) of the Act.

The proviso to s 37A(1) of the Act reads:

> Where any person is charged with any offence against this Act any statement ... made at any time ... shall be admissible at his trial in evidence and, if such person tenders himself as a witness, any such statement may be used in cross-examination for the purpose of impeaching his credit.
>
> Provided that no such statement shall be admissible or used as aforesaid:
>
> (a) if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge against such person, proceeding from a person in authority and sufficient in the opinion of the court to give such person grounds which would appear to him reasonable for supposing that my making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or
>
> (b) in the case of a statement made by such person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect —
>
> 'It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.'
>
> Provided ...

We will take the argument on the statutory caution first. The recording officer had cautioned the appellant thus:

> Adalah kewajipan saya memberi amaran kepada kamu bahawa kamu tidak diwajib berkata apa-apa atau menjawab apa-apa soalan, tetapi apa-apa yang kamu kata sama ada menjawab sesuatu soalan atau tidak akan diambil sebagai keterangan.
>
> ('It is my duty to caution you that you are not obliged to say anything or answer any question but anything you say whether in answer to any question or not will be taken as evidence.')

Mr Karpal Singh argued that caution administered was not complete and the proper form was not used and that while the statutory caution provided for 'anything you say ... may be given in evidence' the recording officer had told the appellant that 'anything you say ... will be taken as evidence.'

It will be noted that the trial judge rejected the challenge. We agree that was rightly done. Of importance is whether there was any hint of compulsion in the caution administered on the appellant to give a statement. There was none. In fact it was clear the caution administered to him showed that he was not required to make a statement but that if he did, it will be used in evidence. It is not necessary to use the prescribed words of the statutory caution; it would be sufficient if the words used are of like effect on the accused: *Din bin Yahya v PP* [1992] 1 MLJ 143. The recording officer here, had instead of using the exact words of the statutory caution, unwittingly provided him with a clearer option for him not to give the statement but the appellant opted to give the cautioned statement. There is no principle of justice that has been injured by the choice of words that the recording officer used when he administered the caution. We would like to

note that in coming to our conclusion we also considered the Court of Appeal (FM) case of *Poon Heong v PP* [1949] MLJ 114. A

We now come to the matter of the argument that the appellant was not properly explained as to what 'inducement' means and that when the appellant stated that his girlfriend was innocent the recording officer did not probe further why he made the statement. It will be noted that neither in the trial within a trial nor in the main trial was it ever remotely suggested by the appellant that he was promised by someone in authority if he made the cautioned statement the girl would be released or that she would not be prosecuted nor was it ever suggested by the appellant that he was in any way prevailed upon by someone in authority to make the cautioned statement. B

The trial judge had made a finding that the recording officer had properly explained what the meaning of inducement is to the appellant — and it is a valid finding of fact with which we agree. C

The defence did not identify the nature of the inducement nor the person who induced the appellant to make the statement. The legal burden is always on the prosecution to prove voluntariness beyond all reasonable doubt and it is not for the defence to prove involuntariness (see *Ibrahim v R* [1914] AC 599) and that the prosecution does by adducing positive evidence to prove that it was made voluntarily. The prosecution, however, will not be able to go beyond that on specific issues unless the defence challenges the admissibility on the ground that the caution was not properly administered with specific details as to what went amiss or challenges the voluntariness and admissibility of the statement on the basis that there was a threat, promise, inducement or oppression not in general and vague terms but in terms enough to identify the nature of the threat, promise, inducement or oppression and the person in authority who inspired it: to ask for something less would be to impose an unfair burden on the prosecution. D E F

It has to be noted that when the appellant was called to make his defence (on the basis of his cautioned statement and also on the basis of evidence of presumptive possession of the heroin) his defence in regard to the cautioned statement was that he had fabricated the incriminating admissions therein as he wished to protect his girlfriend and that the heroin was not his, that the room where the packets of heroin were found was not his, that the room belonged to a male friend which he had borrowed the use of and that the house was occupied by five or six persons. G

The trial judge again reconsidered the cautioned statement and did not change his mind on the admissibility of the cautioned statement. He rejected the story of the appellant that he had fabricated the incriminating admissions therein. The trial judge held that on the basis of the cautioned statement where the appellant had admitted that he was a drug trafficker and that the drug found was his, he was guilty of the offence in the case. He added that the appellant did not raise any reasonable doubt on the prosecution's case. H I

As we had stated earlier we cannot see any reason to disagree with the ruling of the trial judge before he called upon the appellant to make his

defence that the cautioned statement is admissible. And we have no reason to disagree with him when he sustained the admissibility of the cautioned statement after he reconsidered it in the light of the defence evidence and all the other evidence in the case.

As Mr Karpal Singh had rightly conceded before us, this court has to decide whether the cautioned statement is admissible and everything else follows from that ruling. He had argued that if the cautioned statement is inadmissible then on the basis that there is evidence showing that the heroin was found in the room and assuming the room was his, while there is a presumption of possession of the heroin in him by virtue of s 37(d) of the Act, there cannot from this presumption be another presumption that he was trafficking in the drug. We agree that this aspect of the law was clarified by the Federal Court in 1998 in the case of *Muhammed bin Hassan v PP*, (well after the conclusion of the trial of our case by the trial judge in 1995) where as Edgar Joseph Jr FCJ in *Chow Kok Keong v PP* [1998] 2 MLJ 337 at p 347 succintly observed 'in that case it was held that it is not permissible to pile the presumption of trafficking under s 37(da) of the Act upon the presumption of possession under s 37(d) of the Act.'

What it means is that if the conviction of the appellant cannot be sustained on the basis of the cautioned statement, at best the appellant can only be convicted for possession of the heroin. But that is not the case here. The appellant was properly convicted on the basis of his admissions in the cautioned statement which had been properly admitted by the trial judge and which had been properly considered in the light of his defence and all evidence of the case as we had observed. We can see no reason for interfering with his conviction on the charge of trafficking in the said heroin and the sentence passed on him. The appeal against conviction and sentence is dismissed.

Appeal dismissed.

Reported by Peter Ling